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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 45

THE UNITED STATES, PETITIONER

vs.

THE KANSAS FLOUR MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 31, 1941
CERTIORARI GRANTED MAY 12, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 909

THE UNITED STATES, PETITIONER

vs.

THE KANSAS FLOUR MILLS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CLAIMS

INDEX

	Original	Print
Record from Court of Claims.....	1	1
Petition.....	1	1
General traverse.....	8	5
Submission of case without argument.....	8	5
Special findings of fact.....	9	5
Conclusion of law.....	13	9
Opinion, Per Curiam.....	13	9
Judgment.....	15	10
Clerk's certificate [omitted in printing].....	16	10
I		
Order allowing certiorari.....		11

1

In the Court of Claims

No. 43919

THE KANSAS FLOUR MILLS CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

I. Petition

Filed April 20, 1938

*To the Honorable, the Chief Justice and the Judges of the
Court of Claims:*

I

The plaintiff is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, with its principal offices and place of business at 1000 New York Life Building, Kansas City, Missouri, and engaged in the business of manufacturing flour and related products for sale to various buyers, including the United States of America.

II

2 The plaintiff, from time to time, in accordance with the general practice of public bidding, followed by the various Departments of the United States Government, including, among others, the Veterans' Administration, the Department of Agriculture, and the Department of Justice, has submitted bids and obtained awards, which have constituted contracts for the purchase and acceptance of flour and bran by the United States for delivery by the plaintiff corporation at designated periods and stated points of delivery. The plaintiff has at all times complied with the requirements contained in said contracts, and as a result there has been certification to the applicable disbursing officer of the United States for payment to the plaintiff of the indebtedness incurred thereunder.

III

The plaintiff, on or about May 12, 1936, obtained the award on Contract VAS-2150 for the sale of 2,400 barrels of hard wheat flour, to be shipped to Manager, Veterans' Administration, Supply Depot, 1749 West Pershing Road, Chicago, Illinois, on Gov-

ernment bill of lading @ \$3.93 per barrel, or an aggregate price of \$9,432.00, and for the sale of 1,800 barrels of hard wheat flour to be shipped to Manager, Veterans' Administration, Supply Depot, Perryville, Maryland, on Government bill of lading, @ \$3.93 per barrel, or an aggregate price of \$7,074.00. Said wheat flour was shipped, in accordance with instructions received from the Veterans' Administration, and plaintiff's invoices bearing Nos. 3674, 3677, 3728, 3729, 3730, 3731, covering the shipment to Chicago, Illinois, and plaintiff invoices bearing Nos. 3671, 3676, 3708, 3716, 3717, 3718, covering the shipment to Perryville, Maryland, were sent to the Veterans' Administration at the time of shipment. Bureau vouchers covering the total sum of

3 \$16,431.41 were approved by the Veterans' Administration for payment and submitted to the General Accounting Office of the United States for preaudit, in accordance with existing administrative procedure. Payment of said sum of \$16,431.41 represented by said vouchers has never been made, but on the contrary has been withheld and is still withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0437876, Claim No. 0577319 (1) issued March 9, 1937, certified that \$16,431.41 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

IV

The plaintiff, on or about July 31, 1936, obtained the award for the sale of twenty tons of wheat bran, Purchase Order No. 80, at \$24.50 per ton, F. O. B. Kansas City, Missouri, or a total price of \$490.00, and the award for the sale of 250 tons of wheat bran, Purchase Order No. 32, at \$21.25 per ton, F. O. B. Kansas City, Missouri, or a total price of \$5,312.50, from the United States Department of Agriculture, Bureau of Entomology and Plant Quarantine. Said wheat bran was shipped in accordance with instructions from the Bureau at stated intervals until the total amount covered by the orders was delivered. Plaintiff's invoice bearing No. 842 covering Purchase Order 80, and plaintiff's invoices bearing Nos. 568, 582, 610, 622, 623, 631, 651, 652, 653, 654, 655, and 656, covering Purchase Order 32, respectively, were sent at time of shipment, covering each shipment to the United States

4 Department of Agriculture, 230 East 9th Street, Kansas City, Missouri. Bureau Schedule No. 74, dated July 31, 1936, Voucher No. 249, and Bureau Schedule No. 166,

dated August 17, 1936, and Voucher No. 608 were issued and forwarded to the General Accounting Office for preaudit before payment. Payment of the sum of \$5,802.50 represented by these vouchers has never been made, but on the contrary has been withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0440022, Claim No. 0577319 (2) issued March 30, 1937, certified that \$5,802.50 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

V

The plaintiff, on or about Dec. 4, 1936, obtained the award on its proposal of November 5, 1936, Contract No. J1c-4765, Item 1, for the sale of 210 barrels of wheat flour, in accordance with specifications No. 9, dated May 15, 1928, branded as Gilt Edge Hard Wheat Flour, to be shipped to United States Northeastern Penitentiary, Lewisburg, Pennsylvania, @ \$5.02 per barrel, making an aggregate price of \$1,054.20. Said wheat flour was shipped in accordance with instructions from the Department of Justice, Penal and Correctional Institutions, on Government bill of lading J-56720, on or about February 1, 1937. Plaintiff's invoice bearing No. 2976 was sent at the time of shipment to U. S. Northeastern Penitentiary, Lewisburg, Pennsylvania. Bureau Schedule No. 528, dated February 19, 1937, Voucher No. 2272 was issued and forwarded to the General Accounting Office for preaudit before payment. Payment of the sum of

5 \$1,054.20, represented by this voucher, has never been made, but on the contrary has been withheld and is still withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0444185, Claim No. 0577319 (6) issued May 4, 1937, certified that \$1,054.20 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

VI

The total amount of indebtedness owed the plaintiff by the United States on account of products sold, delivered to and accepted by the United States, as shown by the aforesaid allegation of facts is \$23,288.11.

No department, bureau, office, or officer of the United States, to the best of the plaintiff's knowledge, information, and belief,

VII

has ever denied that the plaintiff is entitled to \$23,288.11 on account of the above alleged indebtedness. On the contrary, the bureau, department, office, or officer charged with the responsibility concerning said items has approved payment to the plaintiff, as heretofore alleged, but said amounts have been withheld from the plaintiff by the United States through the Comptroller General of the United States, who has assumed to credit the said amounts on a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies, and which credits the plaintiff has never accepted as payment of the said amounts due it from the United States or any of them, or any part thereof, so that by reason of these premises there is due the plaintiff on account of the foregoing items a total sum of \$23,288.11 with interest on the three amounts shown in paragraphs III, IV, and V from the date said amounts were withheld by said Comptroller General of the United States, all of which is now wrongfully withheld from the plaintiff without its consent and against its will by the United States, as aforesaid, and recovery of which is sought by plaintiff in this action.

VIII

Your plaintiff is not afforded an appeal to any other department of the Executive Branch of the Government from the action of the Comptroller of the United States respecting this claim. No action upon this claim, other than that herein stated, has been taken before Congress or any of the departments of the United States, or in any court other than the petition filed in this Court.

IX

Your plaintiff has at all times, through its officers and agents, borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. Your plaintiff is the sole and absolute owner of the claim herewith presented, and has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

X

7 Your plaintiff believes the facts as herein stated are true. Wherefore, your plaintiff prays judgment in its favor against the United States of America in the sum of

\$23,288.11 for monies wrongfully withheld from it, and for interest at 6% per annum, respectively, on \$16,431.41 from March 2, 1937, on \$5,802.50 from March 30, 1937, and on \$1,054.20 from May 4, 1937, to date of payment, and for such other and further relief as in the premises to this Court may seem meet and proper.

PHIL D. MORELOCK,

*650 Shoreham Building, Washington, D. C.,
Attorney for Plaintiff.*

Of Counsel:

MORELOCK & LAMB,

Washington, D. C.;

CECIL H. HAAS,

Kansas City, Missouri.

[*Duly sworn to by Phil D. Morelock; jurat omitted in printing.*]

8

II. *General traverse*

Filed May 26, 1938

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

SAMUEL E. WHITAKER,

Assistant Attorney General.

III. *Submission of case without argument*

On October 11, 1940, the case was submitted on merits without argument by Phil D. Morelock for plaintiff, and by Guy Patten for defendant.

9

IV. *Special findings of fact, conclusion of law and Per Curiam opinion*

Filed January 6, 1941

Mr. Phil D. Morelock for the plaintiff.

Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson, Fred K. Dyar, and Guy Patten were on the brief.

This case having been heard by the Court of Claims, the court, upon stipulation of the facts and the evidence adduced, makes the following

Special findings of fact

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Kansas

City, Missouri, and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers, including the United States.

2. On May 12, 1936, plaintiff entered into a contract (No. VAS-2150) with the United States Veterans Administration by the terms of which it agreed to sell to the United States 4200 barrels of hard wheat flour at \$3.93 per barrel, or a total price of \$16,506.00. Said supplies were furnished and delivered by the plaintiff to the defendant, accepted and approved by the defendant except for an adjustment of \$74.59 on account of the failure to deliver 3,720 pounds of flour, leaving an agreed total price of \$16,431.41. Proper Bureau Vouchers (Nos. 117 and 9312) were issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the total sum of \$16,431.41 was withheld by the Comptroller General, who, on March 9, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0437876, Claim No. 0577319 (1)) in which he certified that the sum of \$16,431.41 was due the plaintiff under such contract but had been credited by him against an alleged indebtedness of a larger amount on account of an alleged overpayment made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

On June 27, 1936, plaintiff obtained the award for the sale of 250 tons of wheat bran, Purchase Order No. 32, at \$21.25 per ton, F. O. B. Kansas City, Missouri, or a total price of \$5,312.50, and, on July 31, 1936, the award for the sale of 20 tons of wheat bran, Purchase Order No. 80, at \$24.50 per ton, F. O. B. Kansas City, Missouri, or a total price of \$490.00, from the United States Department of Agriculture, Bureau of Entomology and Plant Quarantine. Said supplies were furnished and delivered by the plaintiff to the defendant, accepted and approved by defendant, and proper Bureau Vouchers (No. 249 and No. 608) were issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the sum of \$5,802.50 was withheld by the Comptroller General, who, on March 30, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0440022, Claim No. 077319 (2)) in which he certified that the sum of \$5,802.50 was due to the plaintiff under said contract but had been credited by him against an alleged indebtedness of a larger amount on account of alleged over-payments made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

On December 4, 1936, plaintiff entered into a contract (No. JLC-4795) with the Department of Justice for the sale of 210 barrels of hard wheat flour for delivery to the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, at \$5.02 per

barrel, or a total price of \$1,054.20. Said supplies were furnished and delivered by the plaintiff to the defendant, accepted and approved by defendant, and proper Bureau Voucher (No. 2272) in the amount of \$1,054.20, was issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the sum of \$1,054.20 was withheld by the Comptroller General, who, on May 4, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0444185, Claim No. 0577319 (6)) in which he certified that the sum of \$1,054.20 was due the plaintiff under such contract but had been credited by him against an alleged indebtedness of a larger amount on account of an alleged overpayment made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

3. During the period from May 1935 to January 6, 1936, plaintiff entered into a number of contracts with the United States, by the terms of which it agreed to sell to the United States and the United States agreed to buy a total of 3,383,000 pounds of flour. There follows an excerpt from one of the aforementioned contracts between the plaintiff and the defendant which is typical of the price provision contained in all of the aforementioned contracts and that contained in all of the invoices issued to the defendant by the plaintiff covering the contracts:

Item	Pounds (about)	Unit price (per pound)	Total contract price
Lb. Flour, wheat, in sacks, Type A	78,400	0.0323	\$2,532.32

Each contract also contained the following clause:

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Plaintiff made delivery of all flour provided for in the contracts, same was accepted by defendant, and the defendant paid to plaintiff the bid or contract price therefor.

Plaintiff was the processor of the wheat from which the flour was manufactured, and, along with other first domestic processors, during the period from May 1935 to January 6, 1936, applied to and obtained from the United States District Court for the District of Kansas an injunction against the Collector of Internal Revenue prohibiting the collection from it of any processing taxes so that no processing taxes were paid by the plaintiff on the processing of wheat used in the manufacture of the flour delivered to the defendant.

4. Prior to the execution of the contracts mentioned in Finding 3 hereof, the Secretary of Agriculture, in accordance with the authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regulations approved by the President, established the rate of processing tax imposed on the first domestic processing of wheat and the conversion factor necessary to determine the processing tax imposed upon a particular product manufactured from wheat. Under such regulations the tax was fixed at 30 cents per bushel on all wheat processed, and the conversion factor applicable to floor stocks of flour was fixed at .00704 cents per pound.

5. The identification of the contracts referred to in Finding 3 hereof and the defendant's computation of the amount of the processing taxes which the defendant alleges were included in the contract price of the flour delivered to the defendant by the plaintiff at the rate of .00704 cents per pound of flour follows:

Contract No.	Amount of process tax
W-199-qm-12700	\$5,849.14
W-199-qm-12700	4,695.61
W-199-qm-13049	1,425.38
VAs-41878	11,386.37
W-199-qm-12803	686.25
VAs-1592	3,298.10
VAs-1678	275.97
W-199-qm-12270	802.38
Total	\$28,459.20

13 As heretofore shown, there was certified due the plaintiff in Settlement No. 0437876 the sum of \$16,431.41, and \$1,425.38 thereof was credited to the plaintiff's alleged indebtedness of \$1,425.38 under contract No. W-199-qm-13049; \$10,629.80 was credited to plaintiff's alleged indebtedness under contract No. VAs-41878; \$3,298.10 was credited to plaintiff's alleged indebtedness under contract No. VAs-1592; \$275.97 was credited to plaintiff's alleged indebtedness under contract No. VAs-1678, and the remainder of \$802.16 was credited against plaintiff's alleged indebtedness under contract No. W-199-qm-12270.

As heretofore shown, there was certified due the plaintiff in Settlement No. 0440022 the sum of \$5,802.50 and that amount was credited by the Comptroller General to plaintiff's alleged indebtedness under contract No. W-199-qm-12500.

As heretofore shown, there was certified due the plaintiff in Settlement No. 0444185 the sum of \$1,054.20 and that amount was credited by the Comptroller General to plaintiff's alleged indebtedness of \$756.57 under contract No. VAs-41878 and the remainder of \$482.94 applied against plaintiff's alleged indebtedness under contract No. W-199-qm-12893.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover \$23,288.11.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-three thousand two hundred eighty-eight dollars and eleven cents (\$23,288.11).

Opinion

PER CURIAM: The plaintiff in this case seeks to recover \$23,288.11 for flour sold to the defendant. The price at which the flour was sold is not in dispute and the Comptroller General of the United States has allowed plaintiff's claim in that amount but credited it against an alleged indebtedness of a larger amount on account of what defendant claims to be overpayments made by defendant to plaintiff under eight other contracts. The controversy in the case is whether the defendant had the right to so credit the amount due the plaintiff or deny payment for the flour in any other manner.

The precise question involved in the case was recently decided by this court in the case of Ismert-Hincke Milling Co. v. United States, 90 C. Cls. 27, adversely to the Government, and opinions in a number of cases were cited in support of the decision then made. So far as we are aware the cases are uniform in holding that the contention made by the defendant herein cannot be sustained.

The latest case to which our attention has been called is that of United States v. Hagan & Cushing Co., No. 9459, filed November 30, 1940, in the United States Circuit Court of Appeals for the Ninth Circuit, decided unfavorably to the Government, one Judge dissenting.

It follows that the plaintiff is entitled to judgment for \$23,288.11, which will be entered in its favor accordingly. It is so ordered.

10 UNITED STATES VS. THE KANSAS FLOUR MILLS CORP.

15 V. *Judgment of the court*

January 6, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-three thousand two hundred eighty-eight dollars and eleven cents (\$23,288.11).

16 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 45258. Court of Claims. Term No. 909. The United States, Petitioner vs. The Kansas Flour Mills Corporation. Petition for a writ of certiorari and exhibit thereto. Filed March 31, 1941. Term No. 909 O. T. 1940.

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.